Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

NANCY ALEXANDER, et al.,
Petitioners,

v.

BOSCH AUTOMOTIVE SYSTEMS, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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January 3, 2008

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QUESTION PRESENTED

Section 502(a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), codified at 29 U.S.C. § 1132(a)(3), provides that a "civil action may be brought . . . by a participant . . . to obtain other appropriate equitable relief . . . to redress . . . violations" of the Act.

The Question Presented is:

Does Section 502(a)(3) of ERISA authorize a district court to order a reinstatement to employee benefits as "other appropriate equitable relief" for an employer's admitted violation of the Act?

PARTIES TO THE PROCEEDING

Petitioners:

Nancy Alexander, an individual.
Mildred Clark, an individual.
William Green, Jr., an individual.
Annette Hall, an individual.
Larry Herald, an individual.
Dorothy Holman, an individual.
Roy Homan, Jr., an individual.
Herbert Hughes, an individual.
Joe Joyner, an individual.
Harold David Lester, an individual.
Judy Lyles, an individual.
Ron Marsh, an individual.
Mary Pennington, an individual.
Cammie Prock, an individual.
Willie Rogan, an individual.
Janice Rogers, an individual.
Daniel Rumble, an individual.
Jimmy Scott, an individual.
Susan Scott, an individual.
Marcia Scruggs, an individual.
Paul Sheppard, an individual.
Danny Slayton, an individual.
Dorothy Staten, an individual, and as Administratrix of the Estate of Willie Staten.
Bill Turner, an individual.
Robert Washington, an individual.
Jerrie Witherspoon, an individual.
Charles Wix, an individual.
Wilson Woodmore, an individual.
Rose Woods, an individual.
Gerald Woodward, an individual.

John Jones, an individual.
Ernest Clay, an individual.
Debora Strouce, an individual.
Dennis Crews, an individual.
Mark Helm, an individual.

Respondent:

Bosch Automotive Systems, Inc., a publicly-traded corporation.

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The opinion of the court of appeals is not reported in West's Reporter Series but is unofficially reported at 232 Fed. Appx. 491, 2007 WL 1424299 (6th Cir. May 14, 2007), and 40 Employee Benefits Cas. 2245 (6th Cir. 2007). The opinion of the court of appeals is located in the Appendix, Vol. II to the Petition, at 1a.

The opinion of the district court is an unreported decision. The judgment of the district court is located in the Appendix, Vol. II to the Petition, at 26a. The district court's findings of fact and conclusions of law, pronounced from the bench at the conclusion of the trial and included by reference in the court's judgment, are located in the Appendix, Vol. II to the Petition, at 28a.

JURISDICTIONAL STATEMENT

The court of appeals filed its opinion in this case on May 14, 2007. Petitioners filed a timely petition for rehearing *en banc* on May 29, 2007. The court of appeals denied the petition for rehearing on October 5, 2007. (Appendix, Vol. II to the Petition, at 39a.)

The Court possesses jurisdiction to review the judgment of the court of appeals by writ of certiorari pursuant to 28 U.S.C. § 1254 (2001 & Supp. 2007).

STATUTORY PROVISIONS INVOLVED

Section 510 of the Employee Retirement Income Security Act of 1974 ("ERISA"), Pub. L. 93-406, Title I, § 510, 88 Stat. 895, codified at 29 U.S.C. § 1140 (2001

& Supp. 2007), makes it unlawful to "discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary [of an employee benefit plan] . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan." For such a violation, Section 510 provides: "The provisions of section 502 [29 U.S.C. § 1132] of this title shall be applicable in the enforcement of this section."

Section 502(a)(3) of ERISA, Pub. L. 93-406, Title I, § 502(a)(3), 88 Stat. 891, codified at 29 U.S.C. § 1132 (2001 & Supp. 2007), provides:

> (a) A civil action may be brought –
>
> . . .
>
> (3) by a participant . . . (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce an provisions of this subchapter or the terms of the plan . . . .

STATEMENT OF THE CASE

In 1995, Bosch Automotive Systems, Inc. ("Bosch"), the respondent, operated an electric-motor plant in Hendersonville, Tennessee. Bosch operated the plant in three shifts, and the hourly employees at the plant were represented by the United Auto Workers. (Trial. Tr. at 316.) The plant was losing money. (*Id.* at 345-46.) Bosch management developed "Project Flag" to determine how to close the plant. (*Id.* at 345-48.) Bosch decided to minimize the cost of benefits upon a

plant-closing and decided to time the layoff of employees and the closing of the plant in order to minimize the number of employees entitled to plant-closing benefits. (*Id.* at 350-55.)

Prior to negotiating its 1997 collective-bargaining agreement with the United Auto Workers, Bosch told the union that the plant was losing money and that Bosch intended to close the plant. (*Id.* at 376.) Bosch and the UAW entered into a collective-bargaining agreement in July 1997. (*Id.*) Because the workers at the plant were concerned that the plant might be shut down, they negotiated specific plant-closing benefits (regarding medical benefits and pensions) in the event that the plant was closed, or 70% of the employees were laid off or terminated within any 12-month period (a "constructive" plant closure). (*Id.* at 377.) The collective-bargaining agreement also provided that Bosch would inform the union when it made the decision to close the plant, and it required Bosch to give at least six months' notice prior to actually shutting down the plant. (*Id.* at 385.)

In 1998, Bosch laid off one third of the workers – those on the third shift. (*Id.* at 217.)

In December 1998 and January 1999, Bosch management met to plan the timing of the closing of the Hendersonville plant. (*Id.* at 40, 290.) Bosch initially planned to lay off the second shift in July 1999, with a closure of the plant within twelve months. (*Id.* at 291.) Bosch hired an outside consulting firm, Towers Perrin, to determine the various benefit costs of closing the plant, depending on the timing of a layoff of the second shift and the timing of the plant closing.

(*Id.* at 43.) The financial analysis of Bosch's outside consultants showed that Bosch would incur benefit costs of approximately $3.4 million if the second shift were entitled to plant-closing benefits, consisting of $1.3 million in pension liabilities and $2.1 million in medical liabilities. (*Id.* at 65-69.)

Bosch decided to lay off half of the remaining workers (those on the second shift), wait over six months to announce the plant closing, and then close the plant after twelve months had elapsed following the layoff of the second-shift workers. (*Id.* at 51.) By doing this, Bosch sought to minimize the plant-closing benefits that it would have to pay upon a closure of the plant. (*Id.* at 47.) As Nancy Duffy, Bosch's benefits manager, testified, "Bosch needed to have the timing of the closing set to minimize the number of employees eligible for benefits." (*Id.* at 64.)

Bosch originally planned to lay off the second-shift workers in June 1999. (*Id.* at 42, 224.) That way, Bosch would not need to renegotiate the 1997 collective-bargaining agreement, which expired in July 2000. (*Id.* at 237-38.) Bosch needed to make sure, however, that it had adequate inventory to be able to lay off the second shift and make the transition to manufacturing electric motors in Bosch's plant in Mexico. (*Id.* at 227.) Bosch could not meet its inventory requirements if it laid off the second shift in the summer of 1999. (*Id.* at 227-28.) Bosch increased its production in the spring and summer of 1999 (through overtime work), so that: 1) its inventory could be increased to cover its layoff of the second-shift workers and transition the entire line to Mexico; and 2) the level of inventory would be high enough that a

transition of work to Mexico could take at least twelve months – so that the second-shift workers could be deprived of plant-closing benefits under the 1997 collective-bargaining agreement. (*Id.* at 238-43.)

In October 1999, having reached a level of inventory that would last over twelve months, Bosch laid off approximately 69 second-shift workers.[1] (*E.g.*, *Id.* at 243.) Bosch's stated reason for the layoff was lack of work. (*E.g.*, *Id.* at 94.) Overtime work was still available at the plant, however, even though total overtime worked at the plant was reduced by 50%. (*Id.* at 252.)

On October 13, 1999, Bosch held a meeting for the second-shift workers, at which the impending layoff was announced. At the meeting, Nancy Duffy was specifically asked whether the laid-off workers would be entitled to plant-closing benefits. (*Id.* at 57.) Duffy told the workers that she did not know. (*Id.*) As one laid-off worker testified, Duffy told the workers at the meeting that Bosch had not decided on closing the plant. (*Id.* at 94.) The second-shift workers were laid off on October 29, 1999. (*Id.* at 90.)

One worker, Gerald Woodward, asked in writing if the second shift would be entitled to plant-closing benefits. (*Id.* at 50.) Bosch informed Woodward that no date had been set for closing the plant. (*Id.* at 52-54.)

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[1] Two of the plaintiffs, although on the second shift, were not laid off in October 1999, because they had a protected status. (Trial Tr. at 154.)

In April of 2000, Nancy Duffy calculated the benefit costs of different closing times; Duffy was told "not to share these calculations with anyone outside of [the] management group." (*Id.* at 61-63.) That same month, Duffy was concerned that she would have to divulge Bosch's plans under oath during a workers' compensation proceeding, and she corresponded with Bosch's counsel to voice her concerns about revealing Bosch's plans. (*Id.* at 83-86.)

On May 11, 2000, Bosch announced that it was closing the Hendersonville plant in November 2000, just over twelve months after the layoff of the second shift. (*Id.* at 96.)

In November 2000, just more than twelve months after laying off the second-shift workers, Bosch closed down operations in the Hendersonville plant and transferred its manufacturing line to Mexico. (*Id.* at 270-71.)

On January 17, 2001, thirty-six individual plaintiffs (now petitioners) sued Bosch for violations of Sections 502 and 510 of the Employee Retirement Income Security Act ("ERISA"), codified at 29 U.S.C. §§ 1132, 1140, in the United States District Court for the Middle District of Tennessee.[2] The district court possessed jurisdiction pursuant to 28 U.S.C. § 1331 (2007).

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[2] The plaintiffs also sued the United Auto Workers for lack of representation, but that claim was settled during the pendency of the plaintiffs' claims against Bosch.

Bosch moved to dismiss plaintiffs' claims because of an alleged failure to file suit within the applicable statute of limitations. (Motion for Summary Judgment, R. 11.) The district court rejected Bosch's statute-of-limitations defense. (Order, R. 36 (relying upon the federal discovery rule).)

The district court conducted a trial of the plaintiffs' Section 510 claims on May 23, 24, and 25, 2005.[3] At the conclusion of defendant's case, the district court announced its findings of fact and conclusions of law. (Appendix, Vol. II to the Petition, at 28a (in pertinent part).) The district court found that Bosch's decision to lay off the second-shift employees in October 1999 was motivated by the intent to avoid paying plant-closure benefits under the 1997 collective-bargaining agreement. (*Id.* at 29a) The district court concluded that Bosch's discharge of the plaintiffs to avoid payment of benefits that, in the plain language of the statute, the plaintiffs "may become entitled to," constituted a violation of Section 510 of ERISA. (*Id.* 27a, 36a.)

The district court ordered Bosch to reinstate the plaintiffs to the benefits that they would have been entitled to, upon a plant closure, had Bosch not violated the law. (*Id.* at 27a, 37a.) Bosch objected to the district court's remedy and appealed the district court's decision to the United States Court of Appeals for the Sixth Circuit. (Notice of Appeal, R. 224.)

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[3] The district court rejected plaintiffs' Section 502 claims as a matter of law. (Memorandum Decision, R. 82.)

Bosch asserted three main issues initially on appeal: 1) Bosch did not violate Section 510 of ERISA; 2) the plaintiffs failed to file their complaint in a timely fashion under the applicable statute of limitations; and 3) the remedy imposed by the district court was not "appropriate equitable relief" as permitted by Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3). *See Alexander v. Bosch Automotive Systems, Inc.*, 232 Fed. Appx. 491, 40 Employee Benefits Cas. 2245, 2007 WL 1424299 (6th Cir. May 14, 2007), Appendix, Vol. II to the Petition, at 6a-7a. Bosch conceded that it had violated Section 510 of ERISA at oral argument (Appendix, Vol. II to the Petition at 6a), and the court of appeals concluded that the plaintiffs filed their Complaint within the applicable statute of limitations. *Id.* at 11a. The court of appeals, however, also concluded that the remedy imposed by the district court for Bosch's violation of Section 510 was not authorized under Section 502(a)(3) of ERISA, reversing the judgment of the district court. *Id.* at 23a, 25a ("In sum, Plaintiffs are left without a remedy that falls under the rubric of 'appropriate equitable relief' as permitted under ERISA § 502(a)(3).").

Petitioners filed a timely petition for rehearing *en banc* on May 29, 2007. That petition was denied by an Order entered October 5, 2007. (Appendix, Vol. II to the Petition, at 39a.) This petition for a writ of certiorari followed.

ARGUMENT

This is an ERISA case. It involves the nature of the remedies authorized by Congress in Section 502(a)(3)

of the Act, codified at 29 U.S.C. § 1132(a)(3). Specifically, this case involves the question of whether a district court, in remedying a violation of the non-discrimination protections of Section 510 of the Act, codified at 29 U.S.C. § 1140 (2001 & Supp. 2007), may order that aggrieved ex-employees be reinstated to benefits that they have been deprived of by their employers' unlawful conduct.

Petitioners respectfully submit that the Court has already decided this issue, in the affirmative, in *Varity Corp. v. Howe*, 516 U.S. 489 (1996). Subsequent cases of the Court, however, have cast doubt on the remaining viability of the specific holding in *Varity Corp.*, and a split among the courts of appeals has developed regarding the remedies currently available under Section 502(a)(3). Due to this circuit split, and the confusion about the lasting vitality of the Court's decision in *Varity Corp.*, the Court should grant the petition and issue a writ of certiorari to review the judgment of the court of appeals.

Importantly, the Court has already issued the writ and heard argument in a case, *LaRue v. DeWolff, Broberg & Assoc.*, 458 F.3d 359 (4th Cir. 2006), *cert. granted*, 127 S. Ct. 2971 (2007)(No. 06-856), which presents one issue regarding the remedies available under Section 502(a)(3). It is possible, however, because the Court also granted certiorari regarding another provision of ERISA in *LaRue*, that the Court may not reach the Section 502(a)(3) issue in that case. If the Court does not reach the Section 502(a)(3) issue presented in *LaRue*, then this case squarely and cleanly presents that issue for the Court's consideration. Alternatively, if the Court does reach

the 502(a)(3) issue in *LaRue*, then the Court should grant the petition in this case, vacate the judgment of the court of appeals, and remand to the court of appeals for reconsideration in light of the Court's decision in *LaRue*. In either event, the petition should be granted.

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS DIRECTLY WITH A PRIOR DECISION OF THE COURT, *VARITY CORP. v. HOWE*.

Section 510 of ERISA, 29 U.S.C. § 1140, provides, "It shall be unlawful for any person to *discharge*, fine, suspend, expel, discipline or discriminate against a participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . ." Section 510 also provides, "The provisions of section 1132 of this title shall be applicable in the enforcement of this section."

Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), provides:

> (a) A civil action may be brought –
>
> . . .(3) by a participant . . . (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan . . . .

After determining that Bosch violated Section 510 of the Act by discharging the plaintiffs, the district court in this case remedied Bosch's violation of the Act by reinstating the plaintiffs to the benefits that they would have been entitled to but for Bosch's unlawful conduct. (Appendix, Vol. II to the Petition, at 27a.) The court of appeals, however, rejected the district court's remedy by concluding that reinstatement of the plaintiffs to their lost benefits is not "appropriate equitable relief" under Section 502(a)(3). (Appendix, Vol. II to the Petition, at 23a, 25a). The Petitioners respectfully submit that the court of appeals' decision directly conflicts with the decision of the Court in *Varity Corp. v. Howe*, 516 U.S. 489 (1996).

In *Varity Corp.*, the plaintiffs alleged that they were tricked by their employer to withdraw from their welfare-benefit plan and, thereby, forfeit their benefits. *Varity Corp.*, 516 U.S. at 491-92. The plaintiffs sought "an order that, in essence, would reinstate each of them as a participant in the employer's ERISA plan." *Id.* at 492. The district court determined that Section 502(a)(3) gave the employees "a right to 'appropriate equitable relief . . . to redress' the harm that [the employer's] deception had caused them individually." *Id.* at 494. The Eighth Circuit affirmed, and the Court affirmed. *Id.* at 494, 515.

In holding that a reinstatement to benefits is appropriate relief under Section 502(a)(3), the Court relied upon the structure of the statute (Congress' inclusion of Section 502 as a "catch-all" remedial provision), its legislative history (the remedial provisions "provide both the Secretary and participants and beneficiaries with broad remedies for

redressing or preventing violations of [ERISA]"), and its purpose. *Id.* at 512-13 (citing S. Rep. No. 93-127, p. 35 (1973), 1 Leg. Hist. 621; H.R. Rep. No. 93-533, at 17, 2 Leg. Hist. 2364). The Court concluded that, because Congress had provided the plaintiffs relief in no other section of the statute, reinstatement of them to their benefits was appropriate relief under Section 502(a)(3). *Id.* at 515. The Court stated, "We are not aware of any ERISA-related purpose that a denial of a remedy would serve. Rather, we believe that granting a remedy is consistent with the literal language of the statute, the Act's purposes, and pre-existing trust law." *Id.*

The decision of the court of appeals in this case directly conflicts with the Court's decision in *Varity Corp.* In *Varity Corp.*, the Court held that the plaintiffs *could* sue under Section 502(a)(3) for reinstatement to the benefit plan to which they would have been entitled but for the employer's violation of ERISA. The court of appeals in this case, to the contrary, held that the plaintiffs *could not* sue under Section 502(a)(3) for reinstatement to the benefit plan to which they would have been entitled but for the employer's violation of ERISA.

In declining to follow *Varity Corp.*, the court of appeals below asserted, "The Supreme Court [in *Varity Corp.*] did not consider the propriety of the Eight Circuit's remedy – ordering reinstatement of the plaintiffs into the welfare benefit plans – because the defendant conceded that issue on appeal before the Supreme Court." *Id.* The court of appeals' assertion regarding the Court's decision in *Varity Corp.* is incorrect, based on the Court's own opinion. In *Varity*

Corp., the Court specifically discussed and held that the district court's reinstatement-to-benefits remedy was appropriate equitable relief under ERISA. *Varity Corp.*, 516 U.S. at 514-15. In fact, the Court explained that it took the case in order to resolve whether "the proper interpretation of ERISA § 502(a)(3) . . . authorized the lawsuit *and relief* in this case." *Id.* at 495 (emphasis added). While it is certainly true that the parties in *Varity Corp.* understood a reinstatement-to-benefits remedy to be an equitable remedy (which it most certainly is), they disagreed about whether Congress authorized that remedy in ERISA. In *Varity Corp.*, the Court unequivocally held that Congress did authorize a reinstatement-to-benefits remedy in Section 502(a)(3). *Id.* at 508, 515.

Because the court of appeals' decision is diametrically opposed to the Court's interpretation of Section 502(a)(3), as applied to a reinstatement to benefits in *Varity Corp.*, the Court should grant the petition. Cf. Sup. Ct. R. 10(c)(certiorari appropriate when a court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court").

II. THERE IS A CLEAR SPLIT AMONG THE COURTS OF APPEALS REGARDING THE NATURE OF THE RELIEF PERMITTED BY SECTION 502(a)(3).

The court of appeals' decision in this case conflicts directly with a decision of the United States Court of Appeals for the Ninth Circuit. In *Mathews v. Chevron Corp.*, 362 F.3d 1172 (9th Cir. 2004), the Ninth Circuit upheld an injunction that required an employer to

"modify its retirement plan records to reflect that the six plaintiffs were involuntarily terminated . . . and thus eligible for payment of a [specific termination] benefit." *Id.* at 1176, 1186. The Ninth Circuit relied specifically on the Court's decision in *Varity Corp.* to affirm the remedy imposed by the district court and explicitly held that "instating" plaintiffs to a benefit plan (to which they were denied by the employer's violation of ERISA) is "appropriate equitable relief" under ERISA. *Id.* at 1186. The court of appeals in this case, however, explicitly declined to follow the Ninth Circuit's decision in *Mathews*. (Appendix, Vol. II to the Petition, at 14a-15a, n. 5 ("[W]e find *Mathews* unpersuasive in this context and decline to follow it.").) Quite simply, the Ninth Circuit directly held that a remedy of "reinstatement to benefits" is appropriate equitable relief under Section 502(a)(3); the Sixth Circuit in this case held directly that it is not. Cf. Sup. Ct. R. 10(a)(certiorari appropriate when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter").

Aside from the clear split regarding the availability of a remedy of reinstatement to benefits under ERISA, the courts of appeals are divided regarding even the general nature of the remedies available under the Act. The Sixth Circuit's decision in this case is similar to decisions of other courts of appeals in *Amschwand v. Spherion Corp.*, __ F.3d __, 2007 WL 3027072 (5th Cir. October 18, 2007); *Eichorn v. AT&T Corp.*, __ F.3d __, 2007 WL 1266133 (3d Cir. May 2, 2007), *Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246 (10th Cir. 2004), and *LaRue v. DeWolff, Broberg & Assoc.*, 458 F.3d 359 (4th Cir. 2006), *cert. granted*, 127 S.Ct. 2971

(2007). Those cases rely upon a decision of the Court, *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) (holding insurance company's claim for reimbursement against a plan beneficiary for third-party payment to be legal relief unavailable under Section 502(a)3)), to deny any relief under ERISA that requires a defendant to pay money to aggrieved plaintiffs. The Ninth Circuit in *Mathews* and the Third Circuit in *Leckey v. Stefano*, 501 F.3d 212 (3d Cir. 2007)(remanding to district court for reconsideration of the remedy of a constructive trust, even though it may require the payment of money by the defendant), however, while clearly aware of the Court's decision in *Great-West,* have instead relied on the Court's decision in *Varity Corp.* to hold that equitable relief, even if it costs a defendant money, is available to aggrieved ERISA plaintiffs.

Possibly in light of the split among the circuits regarding the remedies available under ERISA, the Court granted certiorari to review the Fourth Circuit's judgment in *LaRue* on June 18, 2007. 127 S. Ct. 2971. One issue presented in that case, which is analogous to the issue presented in this case, is: "Does § 502(a)(3) permit a participant to bring an action for monetary 'make-whole' relief to compensate for losses directly caused by fiduciary breach (know in pre-merger courts of equity as 'surcharge')?" *LaRue v. DeWolff, Broberg & Assoc.*, 2006 WL 3761777 (U.S. Nov. 6, 2006)(petition for writ of certiorari). For the same reasons justifying the issuance of the writ in *LaRue* on the Section 502(a)(3) question presented in that case, the Court should grant the petition in this case.

III. THIS CASE SQUARELY PRESENTS AN IMPORTANT ISSUE PRESENTED IN *LaRUE v. DeWOLFF, BROBERG & ASSOC.* THAT MAY NOT BE REACHED BY THE COURT.

The Court issued the writ in *LaRue* on two issues. One issue in *LaRue* involves the application of Section 502(a)(3), discussed above. See *LaRue v. DeWolff, Broberg & Assoc.*, 2006 WL 3761777 (U.S. Nov. 6, 2006)(petition for writ of certiorari). The other issue in *LaRue* involves the application and interpretation of Section 502(a)(2), codified at 29 U.S.C. § 1132(a)(2) (2001 & Supp. 2007), regarding personal liability for fiduciary breach of duty. *Id.*[4]

In *LaRue*, a participant in a benefit plan sued the plan fiduciary, alleging losses to the participant's account due to the fiduciary's failure to follow the participant's investment choices. The participant sued to "make whole" his losses under Section 502(a)(2) and Section 502(a)(3). Therefore, in deciding *LaRue*, it is possible that the Court may not resolve the question regarding the remedies available under Section 502(a)(3). If the Court rules for Mr. LaRue based solely on a favorable (from Mr. LaRue's perspective) interpretation of Section 502(a)(2), then it is possible

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[4] Section 502(a)(2) of ERISA provides: "a civil action may be brought . . . by a participant . . . for appropriate relief under [29 U.S.C. § 1109] of this title." 29 U.S.C. § 1109 (2007), provides: "a fiduciary with respect to a plan who breaches . . . any duties imposed upon fiduciaries . . . shall be personally liable to make good such plan any losses to the plan resulting from each such breach."

that the Court may decide not to address the Section 502(a)(3) issue presented in *LaRue*.

To the extent that the Court does not decide the Section 502(a)(3) issue presented in *LaRue*, this case provides an excellent alternative case for the Court to decide that issue. Here, the district court found a clear violation of ERISA by Bosch after a full trial. Bosch waived any objection to the district court's finding of liability in the court of appeals. The only basis for a remedy in this case is Section 502(a)(3), and the district court, over the objection of Bosch, determined that Congress authorized a reinstatement-to-benefits remedy in Section 502(a)(3). The court of appeals, however, after full briefing and argument on this issue, rejected the Ninth Circuit's decision in *Mathews* and distinguished the Court's decision in *Varity Corp.* In doing so, the court of appeals squarely held that Congress did not authorize a reinstatement-to-benefits remedy in Section 502(a)(3). Therefore, to the extent that the Court does not resolve the split among the circuits over the nature of remedies available under Section 502(a)(3) in *LaRue*, this case provides a simple, clear and direct opportunity to resolve that split. In particular, this case provides an excellent opportunity for the Court to resolve any ambiguity or conflict between its prior decisions in *Varity Corp.* and *Great-West*, because the remedy in this case is the precise remedy approved by the Court in *Varity Corp.*

Finally, if the Court reaches the Section 502(a)(3) issue presented in *LaRue*, the Court should, at a minimum, grant the petition in this case, vacate the decision below, and remand this case to the court of appeals for further consideration in light of the Court's

decision in *LaRue*. The plaintiffs in this case should not be prejudiced by the fact that the court of appeals decided their case prior to the Court's clarification of the proper interpretation of Section 502(a)(3) in *LaRue*.

CONCLUSION

The petition should be granted. The writ of certiorari should issue, and the Court should resolve the split among the courts of appeals by deciding this case on the merits. In the alternative, and to the extent that the Court clarifies the proper interpretation of Section 502(a)(3) in *LaRue*, the Court should issue the writ, vacate the judgment below, and remand this case to the court of appeals for reconsideration in light of *LaRue*. In either event, the petition should be granted.

Respectfully submitted.

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